Filed 7/21/20 In re D.H. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.H., a Person Coming Under the Juvenile Court Law.	A155599 (Solano County Super. Ct. No. J40106
THE PEOPLE, Plaintiff and Respondent, v. D.H., Defendant and Appellant.	A156071 (Contra Costa County Super. Ct. No. J18-00815)

In these consolidated appeals, D.H. raises numerous challenges to the terms of his probation imposed after his most recent discharge from the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ). Initially ordered by the juvenile court in Solano County, the probation orders at issue were then adopted without material change by the Contra Costa County juvenile court after transfer proceedings. Many of the arguments raised by D.H. are moot as he was successfully terminated from probation in December 2019. We direct the clerk of the superior court to correct the record as to certain matters, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We will not here recount the lengthy history of these proceedings, which can be found in our multiple prior opinions in this matter. (See *In re*

D.H. (Nov. 30, 2011, A130577) [nonpub. opn.], review den. Feb. 22, 2012, S199303 (*D.H. I*); *In re D.H.* (Nov. 16, 2016, A145521) [nonpub. opn.], review den. Mar. 1, 2017, S239200 (*D.H. II*); *In re D.H.* (Mar. 23, 2020, A153444) [nonpub. opn.] (*D.H. III*).)[1] Following a contested jurisdictional hearing in September 2010, the juvenile court sustained one count of lewd act on a child involving an incident between D.H and his half brother when he was 12 years old. (Pen. Code, § 288, subd. (a).) D.H. was declared a juvenile court ward pursuant to Welfare and Institutions Code[2] section 602 and initially placed on probation in his mother's home. (*D.H. II*, *supra*, A145521.) However, various behavioral problems led to a series of unsuccessful out-of-home placements and multiple sustained probation violations, ultimately culminating in commitment to DJJ. (*D.H. III*, *supra*, A53444.)

D.H. was discharged from DJJ in August 2018 and returned to Solano County for further proceedings. In advance of his reentry hearing, probation reported that D.H. had earned his GED in July 2018, understood his sex offender registration requirement, had secured post-release employment, and hoped to enroll in college classes. D.H. acknowledged he was a recovering addict and expressed willingness to engage in services. Probation recommended that the juvenile court terminate DJJ jurisdiction and reinstate Solano County jurisdiction, continue D.H. as a ward, transfer the matter to Contra Costa County (his county of residence) for supervision, and order various terms of probation, including participation in a California Sex

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[1] At the request of the parties, we take judicial notice of the documents filed in connection with D.H.'s prior appeals and habeas petitions—including our prior unpublished opinions—to the extent necessary for a complete understanding of the issues in the current appeals. (See Evid. Code, §§ 452, subds. (a) & (d)(1), 459, subd (a).)

[2] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

Offender Management Board (CASOMB)-certified treatment program and registration as a sex offender. At the hearing on August 24, 2018, the parties submitted the matter, and the Solano County juvenile court continued D.H. as a ward, ordered probation on the recommended terms and conditions, and transferred the matter to Contra Costa County. D.H. filed a notice of appeal from this order (case No. A155599).

Contra Costa County accepted transfer and set a review hearing so that terms of supervision could be set. After review of D.H.'s extensive case file, probation recommended that the probation conditions ordered in Solano County be "transposed" into the Contra Costa County terms of probation. This included, among other things, the requirement that D.H. attend a CASCOMB-certified program and register as a sex offender. At the hearing on October 9, 2018, D.H.'s attorney opposed the recommendation, arguing that, given his age and history, there was no reason for D.H. to be on probation any longer. Counsel also objected to the order requiring a CASCOMB-certified treatment program on grounds of inability to pay. The probation representative explained that they could provide job placement assistance but had no program for financial aid. The juvenile court continued D.H.'s wardship and ordered probation to supervise him in his mother's home under the recommended terms and conditions. D.H. filed a second appeal from this order (case No. A156071).[3]

In advance of a review hearing on December 3, 2019, probation recommended that D.H.'s wardship be vacated and his probation terminated successfully given a recent evaluation indicating D.H. was no longer in need of sex offender treatment and the imminent expiration of juvenile court

[3] By order dated June 24, 2020, we consolidated both of D.H.'s pending appeals for purposes of decision.

jurisdiction over the former minor. In submitting on the recommendation, the prosecutor noted that she would not object because it was through "no fault of his own" that D.H. sought to comply with the sex offender treatment requirement, could not afford it, and was unable to get assistance. The juvenile court followed the recommendation, successfully terminating D.H.'s probation, vacating wardship, and ordering the related juvenile court file sealed pursuant to section 786. D.H.'s juvenile court counsel indicated her intention to file a motion seeking relief for D.H. from his sex offender registration requirement. (See § 781, subds. (a)(1)(A) & (a)(1)(C).) By letter dated May 26, 2020, we were informed that this motion has not yet been filed.

DISCUSSION

I. Multiple Issues Raised Are Moot.

D.H. concedes that many issues raised in these consolidated appeals are now moot given that he was successfully terminated from probation in December 2019. We agree that his claims challenging the propriety of an electronic search condition, gang conditions, and no-contact order—conditions to which D.H. is no longer subject—are moot and we will not address them. Although D.H. acknowledges that he is no longer subject to the requirement that he attend a CASCOMB-certified sex offender treatment program, he contends it was improper for the juvenile court to order this condition and asks that we address this claim on appeal. As we explain below, we decline to do so.

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), D.H. argues it was fundamentally unfair to condition his successful release from probation on payment of treatment costs for a CASCOMB-certified program, which, through no fault of his own, he had no ability to pay. D.H. also asserts

that it is generally impermissible to require a ward to comply with conditions that are beyond his ability, and, in any event, the county was required to pay for the costs of treatment through the Juvenile Reentry Fund. (See §§ 1981, 1984.) Finally, D.H. urges that ordering sex offender treatment absent any evidence that such treatment was still necessary to prevent further offending was error.

" ' "[A]s a general rule it is not within the function of the court to act upon or decide a moot question or speculative, theoretical or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition." ' " (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490 (*I.A.*).) Instead, courts focus on deciding actual controversies in which effective relief can be granted. (*Ibid.*; see *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1498.) Thus, a challenge to a probation condition is generally moot where a juvenile court ward is no longer subject to that condition. (*In re Erica R.* (2015) 240 Cal.App.4th 907, 911 (*Erica R.*).)

D.H. is correct that " ' "[i]f an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot." ' " (*Erica R.*, *supra*, 240 Cal.App.4th at p. 911.) Appellate review of the instant sex offender treatment order is warranted, in his view, due to the importance of the issues raised and for the benefit of other youth subject to such orders. On this record, however, we see no reason to exercise our discretion to reach the merits of D.H.'s otherwise moot claims.

Even if it were the case that D.H. was unable to pay for the mandated sex offender treatment, the record discloses that D.H. suffered no actual injury from being subjected to the order. The prosecutor conceded that D.H.

should not be penalized where any lack of compliance was through "no fault of his own" and did not object to D.H.'s successful termination from probation. Thus, were we to consider the merits, we would be unlikely to reach any useful conclusions under *Dueñas* or with respect to the county's funding obligations for wards discharged from DJJ. Similarly, whether an order for further sex offender treatment was appropriate at a specific point in time in this highly unusual case would do little to establish any clear rule for other wards. Under the circumstances, we fall back on the general principle that " 'unnecessary lawmaking should be avoided, both as a matter of defining the proper role of the judiciary in society and as a matter of reducing the risk that premature litigation will lead to ill-advised adjudication.' " (*I.A.*, *supra*, 201 Cal.App.4th at p. 1490.)

II. The Commitment to DJJ Was Not Vacated

D.H. next argues that the order requiring him to register as a sex offender must be stricken because it was statutorily unauthorized. D.H. points to the language of Penal Code section 290.008, which authorizes sex offender registration only for persons who have been "discharged or paroled" from DJJ after having been adjudicated a juvenile court ward for certain enumerated offenses. (Pen. Code, § 290.008, subd. (a).) He notes that at the August 2018 reentry hearing at which his probation was reinstated, the juvenile court stated as follows: "[D.H.] what we do at this point in time basically is now that you have completed [DJJ] is convert this back to a probation matter. [¶] *So I am going to vacate the commitment to [DJJ].*" (Italics added). Later in the proceedings, the court stated that "*I will terminate his commitment to the Juvenile Justice Facility*." (Italics added).

Focusing on the juvenile court's first statement above, and ignoring the second, D.H. argues that the "effect of vacating an order is to eliminate the

judgment" (*Bulmash v. Davis* (1979) 24 Cal.3d 691, 697), and once a judgement is vacated "the status of the parties that existed prior to the judgment is restored and the situation then prevailing is the same as though the order or judgment had never been made" (*ibid.*). D.H. thus contends that the DJJ commitment, once vacated, cannot support a registration requirement under Penal Code section 290.008. We are not persuaded.

The clerk's transcript in this case is unequivocal that D.H.'s DJJ commitment was terminated, not vacated. The reporter's transcript, on the other hand, is ambiguous because it states both that the DJJ commitment was vacated and that it was terminated. When a conflict arises between the clerk's transcript and the reporter's transcript, we must harmonize the record to the extent possible, " ' "but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case." ' " (*People v. Beltran* (2013) 56 Cal.4th 935, 945, fn.7; see *People v. Smith* (1983) 33 Cal.3d 596, 599.)

Under the circumstances of this case, we give greater credence to the statement in the clerk's transcript. The probation report prepared for the hearing recommended that D.H.'s DJJ commitment be terminated. At the beginning of the hearing, the court asked if the parties had any comments, and both parties submitted the matter on probation's report. Indeed, D.H.'s attorney submitted on the report *and* the recommendations. No argument was presented that the DJJ commitment should be vacated as if it had never happened. The juvenile court then adopted probation's recommendations. Although it appears that the court initially misspoke when it explained to

D.H. that it would vacate the commitment order, the court later clarified that it was terminating the DJJ commitment. And, importantly, the court emphasized the registration requirement, stating to D.H. that "[y]ou need to register" and "[m]ake sure you get down and get that registration done." On this record, it appears clear that the court intended to terminate the DJJ commitment, not vacate the prior commitment order. Accordingly, D.H. was required to register as a sex offender under Penal Code section 290.008.

III. The Sex Offender Registration Order Was Statutorily Authorized

Equally unconvincing is D.H.'s claim that the juvenile court's sex offender registration order must be stricken because D.H. was ordered to register pursuant to Penal Code section 290, which only applies to adult offenders. It is true that both the Solano County and the Contra Costa County juvenile courts ordered D.H. to register "with the local police or Sheriff's Department in accordance with and pursuant to Penal Code Section 290, within five days of release from custody."[4] It is also correct that Penal Code section 290 authorizes registration for adult offenders and that D.H.'s registration requirement was, instead, authorized under Penal Code section 290.008. (See *People v. Fernandez* (2017) 11 Cal.App.5th 926, 930 ["individuals who are required to register as sex offenders because of a juvenile adjudication must do so pursuant to section 290.008, not section 290, subdivision (c)"].) Penal Code section 290.008, subdivision (a) provides: "Any person who, on or after January 1, 1986, is discharged or paroled from the Department of Corrections and Rehabilitation to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the

[4] D.H. reportedly did so, registering with the Contra Costa County sheriff's office on August 29, 2018, and providing a copy of his registration form to probation.

commission or attempted commission of any offense described in subdivision (c) shall register in accordance with the Act."

D.H. cites no authority, however, for the proposition that the registration order is now void as a result of the trial court failing to mention Penal Code section 290.008. In light of our conclusion that D.H.'s commitment to DJJ was terminated, there can be no dispute that D.H. was required to "register in accordance with the Act." (Pen. Code, § 290.008, subd. (a).) The "Act" is the Sex Offender Registration Act, Penal Code sections 290 to 290.024, inclusive. (Pen. Code, § 290, subd. (a).) Subdivision (b) of Penal Code section 290 contains the procedures for registering under the Act. Thus, in ordering D.H. to register in accordance with Penal Code section 290, the juvenile court was simply requiring registration pursuant to the *procedures* set forth in Penal Code section 290, not suggesting that the authorization for the registration requirement came from that statute. We see no error.

IV. Only One Restitution Fine is Proper

D.H. complains that he was improperly assessed more than one restitution fine pursuant to section 730.6. Pursuant to that statute, a restitution fine of between $100 and $1,000 must generally be imposed as a consequence of a felony juvenile adjudication, with the exact amount to be set based on the seriousness of the offense. (§ 730.6, subd. (b)(1).) In October 2010, the juvenile court imposed the mandatory minimum restitution fine of $100 at the original dispositional hearing. In March 2018—shortly before D.H.'s second discharge from DJJ—the court received a letter from the Office of Victim and Survivor Rights and Services Juvenile Service Unit (Victim Services) indicating that the commitment documentation did not include reference to a restitution fine. The letter asked the court to "clarify the total

fine amount ordered" and suggested that the court consider amending the relevant minute order "to include the appropriate Restitution Fine." The court issued an amended minute order on April 4, 2018, stating that the court "orders restitution in the amount of $100—pursuant to 730.6(b) WIC." The court then forwarded a certified copy of the amended order to Victim Services as requested.

At the subsequent reentry hearing in Solano County at which D.H.'s probation was reinstated, the prosecutor expressed confusion regarding whether the court had to "essentially restate" the previously ordered terms given the intervening DJJ commitment, and the court indicated it would go through and read them all. During this proceeding, the court stated that "[t]here would have been previously imposed a $100 Restitution Fund fine." The related minute order indicated that D.H. must pay the $100 restitution fine. Once the case was transferred, the juvenile court, in adopting D.H.'s terms of probation for Contra Costa County, confirmed that a $100 restitution fine had previously been imposed and ordered "the same that occurred in Solano County." We believe the record in this matter supports the conclusion that the $100 restitution fine was only imposed once, at the original dispositional hearing in 2010, and that its imposition was subsequently clarified three different times—at the behest of Victim Services in April 2018, in connection with the reinstatement of probation in Solano County in August 2018, and then upon transfer to Contra Costa County in October 2018. To the extent the record may be ambiguous, we clarify that only a single restitution fine of $100 was properly imposed and subject to collection.

V. Correction of the Record is Appropriate

D.H. finally asks that we correct the record to remove two references to sodomy in probation's August 2018 report, which he argues erroneously indicate that he committed sodomy, even though he was acquitted of this charge. (See "Addendum/Memo" ["during the sodomy"]; "Juvenile Edited Criminal History" ["minor sodomized 8 year old half-brother C.F."].) As early as February 2011, D.H.'s juvenile court counsel objected to similar language in a prior probation report, arguing that the sodomy references should be removed because the court had not sustained the sodomy count. The juvenile court and the prosecutor both agreed, and the court ordered probation to edit the report accordingly. Yet the same language resurfaced in the August 2018 report.[5] Since the juvenile court and the parties have previously agreed that the identified language is inappropriate and should not be used, we will order the two statements stricken.

DISPOSITION

The clerk of the Contra Costa County Superior Court is ordered to strike the statements "during the sodomy" and "minor sodomized 8 year old half-brother C.F." from the August 2018 probation report in this matter. The judgment is otherwise affirmed.

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[5] Under these circumstances, we exercise our discretion to reach the merits of the claim, despite the fact that D.H. did not again object to these report references during the August 2018 hearing at which his probation was reinstated. (See *People v. Welch* (1993) 5 Cal.4th 228, 234–235 [failure to object at the sentencing hearing to alleged errors or omissions in the sentencing report generally forfeits the issue on appeal].)

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Sanchez, J.

WE CONCUR:

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Humes, P. J.

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Margulies, J.

A155599 & A156071 In re D.H.